United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

P/S B

75-1007

To be argued by
MICHAEL YOUNG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- PATRICK J. McDONOUGH, Appellant.	Docket No. 75-1007

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT AND ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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QUESTION PRESENTED

Whether the District Court erred in holding that the Government had not violated the Prompt Disposition Rules.

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from an order and judgment of the United States District Court for the Eastern District of New York (The Honorable Edward R. Neaher) entered December 9, 1974, denying appellant McDonough's motion to vacate a judgment of conviction and dismiss the indictment because he had been denied a speedy trial under the Plan for the United States District Court for the Eastern District of New York for Achieving Prompt Disposition of Criminal Cases (hereafter referred to as "Prompt Disposition Rules"). McDonough was sentenced on the underlying conviction to a three-year term of probation.

This Court continued The Legal Aid Society, Federal Defender Services Unit, as counsel on appeal, pursuant to the Criminal Justice Act.

Statement of Facts

A. Prior Proceedings

McDonough was originally convicted, after a non-jury trial before Judge Neaher, of uttering three counterfeit ten dollar United States Federal Reserve notes, in violation of 18 U.S.C. §472. Judgment was entered on April 19, 1974.

McDonough appealed to this Court (Doc. No. 74-1530), arguing that the case should be remanded to the District Court for a hearing to determine whether his conviction should be vacated and his indictment dismissed because of the Government's failure to comply with the Prompt Disposition Rules. On October 3, 1974, this Court remanded the case for such a hearing. (A copy of this Court's opinion is set forth at "C" of appellant's separate appendix.)

B. The Hearing

The hearing was held on November 22, 1974. The Government conceded that McDonough had been arrested on May 13, 1974* (22**), and that the Government had not filed its notice of readiness until November 19, 1974 (6), at least six days*** in excess of the six months permitted under the Prompt Disposition Rules. The Government argued, however, that the running of

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*At the commencement of the hearing the Government stated that McDonough had been arrested on May 14, 1974 (5). Later, however, the arresting agent testified that the arrest had actually occurred on May 13, 1974 (22).

**Numerals in parentheses refer to pages of the transcript of the hearing, which is included as part of the record on appeal.

***The Government contended that the arrest date was not counted for purposes of tabulating the period between arrest and the filing of the notice of readiness. It therefore claimed that the delay was five days. This figure, however, was based on the Government's erroneous assumption that the arrest occurred on May 14 (see fn. 1, supra). Since the arrest actually occurred on May 13, the delay was six days, not counting the day of the arrest. If that day is counted, the delay was seven days.

the six-month time period was tolled by two "excludable" time periods, a three-week period when the Government claimed that McDonough had indicated he would cooperate with Federal agents, and a fourteen-day period when the Government claimed McDonough was "unavailable" (3-4).

1. The evidence as to the three-week period of McDonough's alleged cooperation

Secret Service Special Agent Caputo testified that he arrested McDonough on May 13, 1974 (22). The Government stipulated that McDonough was arraigned the following day, May 14, 1974, and that The Legal Aid Society was assigned as his counsel at that time (38).

Caputo testified that shortly after McDonough's arrest, Caputo spoke to him. As a result of this conversation, McDonough agreed to attempt to determine the source of the counterfeit currency for which he had been arrested, and to provide Caputo with this information (23-25). During the next three weeks Caputo spoke to McDonough on approximately four occasions concerning this "cooperation" (28). In the last conversation, McDonough indicated to the agent that he did not wish to attempt to assist him any further (30).

The Government conceded that these conversations went on "after Mr. McDonough was assigned counsel" without any effort being made to notify counsel (36-37). Caputo testified that

he never attempted to inform McDonough's counsel before any of his conversations with McDonough, and that he did not even determine whether counsel had been assigned to McDonough (35-37).

2. The evidence as to McDonough's alleged unavailability

Agent Caputo testified that McDonough, shortly after his arrest, consented to a search of "his apartment, 26 Marvin Avenue, Hicksville, Long Island, where he stated he resided with his brother James and his sister-in-law" (34). James McDonough later informed the agent that his brother Patrick resided at the Marvin Avenue address on weekends and lived at another apartment in Hicksville during the week. The United States Attorney's "dope sheet" indicated that this other apartment was at 121 Newbridge Road, Hicksville, Long Island (63), the address McDonough gave when he was arraigned (64).

On October 31, 1974, a notice of pleading was mailed by the United States Attorney's office to McDonough at the Newbridge Road address (61). This notice was returned undelivered to the United States Attorney's office on November 5, 1974, at which time it was re-addressed and re-mailed to the Marvin Avenue address, where it was received by McDonough (62).

3. The District Court's Findings*

The District Court ruled that the Government had established that the three-week period following McDonough's arrest was an "excludable" period under the Prompt Disposition Rules because during that period Agent Caputo and McDonough were discussing cooperation (69-75). In so holding, the Court rejected defense counsel's argument that that period should not be excluded since the discussions concerning cooperation were illegal, having occurred after counsel was assigned but without notification to counsel (73-74).

The Court also held that the Government had established a five-day "excludable" period for the time between the date when the notice of pleading was mailed to McDonough at the Newbridge Road address and the date when it was re-mailed to the Marvin Avenue address (75-76). The exclusion of these periods brought the filing of the notice of readiness within the six-month period permitted under the Prompt Disposition Rules.

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*The colloquy between counsel and the District Court and the District Court's rulings are set forth in their entirety at "D" of appellant's separate appendix.

ARGUMENT

THE DISTRICT COURT ERRED IN HOLDING THAT THE GOVERNMENT HAD NOT VIOLATED THE PROMPT DISPOSITION RULES.

Under Rule 4 of the Prompt Disposition Rules, and the cases interpreting that rule, if the Government has failed to file its notice of readiness within six months after the defendant's arrest, the indictment must be dismissed. United States v. Flores, 501 F.2d 1356 (2d Cir. 1974); Hilbert v. Dooling, 476 F.2d 355 (2d Cir. en banc), cert. denied, 94 S.Ct. 56 (1973). In the present case, the notice of readiness was not filed by the Government until November 19, 1974, six months and six days* after McDonough's May 13 arrest. Consequently, unless there was an "excludable" period of at least six days' duration which tolled the running of the six-month period, McDonough's conviction must be vacated and the indictment dismissed. United States v. McDonough, Doc. No. 74-1530, slip opinion 5615, 5616-5618 (2d Cir., October 3, 1974); United States v. Flores, supra.**

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*The Government contended in the District Court that the date of arrest was not counted in calculating the six-month period, saying rather that the period began to run the day after arrest. If the day of arrest were also counted, the delay here would be six months and seven days. Since the single additional day is irrelevant to this appeal, appellant will assume arguendo that the date of arrest is not treated as the first day of the six-month period.

**This Court, in this case (United States v. McDonough, supra), interpreted its earlier decision in United States v. Flores, supra, to hold that a delay of even a few days over

The District Court held that there were two "excludable" periods which brought the filing of the notice of readiness within the six-month period. One of these, a five-day period during which the Court found that the defendant was "unavailable" (see United States v. Flores, supra), is irrelevant for purposes of this appeal because the Government is required to show at least six days of "excludable" time in order to establish that its filing of the notice of readiness was timely.*

The District Court also held that the three-week period following McDonough's arrest was an "excludable" period because during that time Agent Caputo and McDonough had several conversations concerning McDonough's possible cooperation with the agent. United States v. Valot, 481 F.2d 22 (2d Cir. 1973). The agent's actions in pursuing this cooepration, however, were in clear violation of McDonough's Sixth Amendment right to counsel. It appears from the hearing record that McDonough was arrested on May 13, 1974. He was arraigned the following day, at which time he was assigned counsel. Shortly after his arrest, Agent Caputo talked to him, eliciting from him an agreement that he would attempt to identify the source of the counterfeit

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[Footnote continued from the preceding page]

the six-month period is a violation of the rules which cannot be excused merely because it is "de minimis."

*Appellant McDonough does not concede the validity of the Court's ruling on this issue, and is prepared to argue that the five-day period was not "excludable" should it become relevant to this case.

notes for which he was arrested and would pass this information on to Caputo. During the next four weeks, Caputo spoke to McDonough on approximately four occasions concerning this attempted cooperation. The Government conceded that these conversations went on "after Mr. McDonough was assigned counsel" without any effort being made to inform counsel of their occurrence. Caputo testified that he never attempted to notify McDonough's counsel of these conversations, and in fact never even attempted to determine whether counsel had been assigned at McDonough's arraignment.

Caputo's conduct in repeatedly communicating with McDonough in the absence of counsel after counsel had been assigned was clearly unconstitutional. Massiah v. United States, 377 U.S. 201, 204-207 (1964); Spano v. New York, 360 U.S. 315 (1959). In these cases, the Supreme Court held that communications in the absence of counsel between state or governmental agents and the defendants after the defendants' right to counsel had attached violated the defendants' Fifth, Sixth, and Fourteenth Amendment rights. Presumably those defendants, properly counseled, might not have made their incriminating statements. Consequently, the Court, in order to prevent the prosecution from benefitting from its own unconstitutional misconduct, ordered those statements suppressed. Similarly McDonough, had he been afforded the advice of counsel to which he was constitutionally entitled, might well have declined, on the advice of that counsel, to attempt any cooperation with Agent Caputo.

It is a basic tenet of due process that the Government is not entitled to benefit from its own misconduct. See United States v. Russell, 411 U.S. 423, 430-431 (1973); Mapp v. Ohio, 367 U.S. 643 (1967); Miranda v. Arizona, 384 U.S. 436 (1966); Wong Sun v. United States, 371 U.S. 471 (1963); Silverman v. United States, 365 U.S. 505 (1961). Although in those cases suppression of the evidence illegally obtained was all that was necessary to prevent the Government from benefitting from its own illegality, it is clear that where suppression of evidence is insufficient to prevent such governmental benefit, this Court is required, under constitutional mandate (see, e.g., Barker v. Wingo, 407 U.S. 514 (1972)), or its own supervisory powers (see United States v. Estepa, 471 F.2d 1132 (2d Cir. 1972); cf. Rea v. United States, 350 U.S. 214 (1955); McNabb v. United States, 318 U.S. 332 (1943)) to formulate a remedy which will vitiate the effect of the misconduct on the court proceedings.

In the present proceeding, the only appropriate remedy is to preclude the Government from depicting the three-week period of cooperation which was the direct product of Agent Caputo's unconstitutional conduct as an excludable period under the Prompt Disposition Rules. Since the Government has established no other period which would excuse its violation of the six-month requirement of those Rules, McDonough's conviction must be vacated and the indictment dismissed.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the indictment ordered dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

February 19, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Eastern District of New York.

Mark A. G